UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELECTROLUX HOME PRODUCTS, INC.	)	
	)	
and	)	Case 15-CA-206187
	)	
J'VADA MASON, an Individual	)	

RESPONDENT'S REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Reyburn W. Lominack, III, Esquire
Stephen C. Mitchell, Esquire
FISHER & PHILLIPS LLP
1320 Main Street, Suite 750
Columbia, South Carolina 29201
Tel. (803) 255-0000
smitchell@fisherphillips.com
rlominack@fisherphillips.com

Attorneys for Respondent

September 28, 2018

I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent, Electrolux Home Products, Inc., submits this reply to counsel for the General Counsel's (CGC) answering brief to Respondent's exceptions to Administrative Law Judge Arthur J. Amchan's July 2, 2018 Decision.

II. REPLY

Charging Party, J'Vada Mason, directly refused to comply with her supervisor's lawful instructions when he needed her help during a very busy time. She was a team lead, but she did not act like it. Electrolux thoroughly investigated and confirmed her misconduct. She was treated no differently than anyone else found guilty of that degree of insubordination. To excuse Mason's behavior under these circumstances is to insulate her merely because she was a member of the Union's negotiating committee. Such a result cannot stand.

A. The Decision-Makers Did Not Have the Requisite Knowledge of and/or Animus Towards Mason's Union Activity to Support the General Counsel's *Wright Line* Burden.

The judge found that Diana Jarrett and Leola Roberts in Electrolux's Human Resources department had knowledge of, and animus towards, Mason's alleged union activity based on (1) the alleged confrontation Mason had with then-Plant Manager Sebastian Gulka and an unidentified manager named "Matt" during a meeting prior to the second election in September 2016, and (2) because Mason was allegedly subject to disparate treatment. (Decision, p. 10, lines 27-31.)

Electrolux argued in support of its exceptions that no inference of animus could be drawn from the alleged incident preceding the second election because, as the judge readily acknowledged, it was "unclear as to who in management, besides plant manager Gulka, was aware of [Mason's] conduct at the captive audience meeting" (Decision, p. 10, lines 1-2). Electrolux further argued that no inference of animus could be drawn on the basis of disparate treatment

because there is no evidence of disparate treatment. (R. Br. 29-39.) CGC offered no persuasive arguments to rebut Electrolux's arguments.

1. No union animus based on Mason's alleged conduct during meeting in September 2016

As an initial matter, even assuming—contrary to the judge's conclusion—that some members of Electrolux's negotiating committee were decision-makers, there is no evidence they had knowledge of Mason's conduct prior to the second election in September 2016.[1] At best CGC merely argues that because Vice President David Smith was serving as the interim Human Resources Director at the time Mason allegedly had the confrontation with Gulka and "Matt" during a captive audience meeting, it is "reasonable to infer" that he was aware of Mason's protected conduct. (GC Br. 25.) This is far too slender a reed upon which to base a finding of knowledge of union activity.

Similarly, the fact that Gulka may have been the plant manager when Mason was discharged is irrelevant because there is no record evidence that he was involved in the decision to terminate her or that he communicated with Jarrett and/or Roberts about the alleged incident involving Mason, who was one of nearly 700 employees at the Memphis plant at the time. The Board has explained that it "will not impute knowledge of union activities where the credited testimony establishes the contrary." *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). The credited evidence, as recounted in Respondent's exceptions brief, establishes that neither

[1]Contrary to CGC's arguments, members of Electrolux's negotiating committee were not "decision-makers" simply because they were consulted about the proposed decision to discharge Mason. The record reflects that Electrolux's standard practice was for the human resources team to consult with the legal team prior to implementing any discharge decisions. Consistent with that practice, Jarrett and Roberts consulted with the legal team, including outside counsel, who happened to also be members of Electrolux's negotiating committee, prior to terminating Mason. Because of the attorney-client privilege, however, evidence concerning the substance of that discussion was not introduced at the hearing. Thus, it is unreasonable and highly improper to infer from the record evidence that members of Electrolux's legal team were decision-makers merely because Jarrett and Roberts consulted with them for legal purposes before discharging Mason.

Jarrett nor Roberts was aware of Mason's union activity during the organizing campaign or while on the bargaining committee.

2. No union animus based on disparate treatment

The crux of the judge's conclusion that union animus motivated Jarrett's and Robert's decision to discharge Mason is his erroneous finding that Mason was subjected to disparate treatment. In its brief in support of exceptions, Respondent explained, point by point, why none of the alleged comparators on which the CGC's case rests proves discrimination. (R. Br. 29-39.) CGC failed to adequately rebut Respondent's explanations.

First, CGC contends that Jarrett's testimony about Lakelia Davis "served to strengthen the General Counsel's case by showing that Davis engaged in conduct that was more egregious than anything Mason was accused of" (GC Br. 29). Jarrett explained that Davis was discharged for cursing at an auditor, driving off on a forklift, and refusing to be audited (Tr. 458-459). Davis' situation does not strengthen the General Counsel's case. It is illogical to presume that because Davis was discharged for her behavior—even assuming it was more egregious than Mason's—Mason should not have been discharged for her behavior. Had Davis *not* been discharged for her behavior, the General Counsel's argument may have made sense.

Second, CGC argues that Respondent should have shown that some or all of the comparator employees engaged in known union activities comparable to Mason, which would support a finding that something other than union activity explains the difference in their treatment (GC Br. 29-30). Again, CGC's argument is flawed. The onus is on the General Counsel to prove his case, including proving that the alleged comparators were like or not like the alleged discriminatee. See *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1198 (2004) ("[T]he General Counsel did not show that [the alleged comparators] were not, like [the alleged discriminatee], open supporters of

the Union."). It is not Respondent's duty to establish the union sentiments of the General Counsel's alleged comparators. Moreover, as explained in Respondent's exceptions brief, to satisfy the General Counsel's proposed burden Respondent would have to unlawfully and impractically poll employees about their union activity when terminating them.

Notwithstanding, the only evidence in the record concerning the union sentiments of any alleged comparator involves Carey Taylor, who was discharged for insubordination. Taylor filed an unfair labor practice charge claiming that he was discharged and suspended because of his union activity. After Region 15 investigated the charge, the parties agreed to settle only the allegation concerning the suspension (GC Exh. 3). Thus, the record evidence reflects that Taylor refused to perform a task assigned to him, and he was discharged for that reason and not because of his union activity.

Third, CGC argues that Respondent unsuccessfully attempts to discount the evidence of employees who were not terminated for insubordination by pointing out they were not part of the materials department or were not team leads, like Mason (GC Br. 30). According to CGC, these arguments were properly rejected by the judge. Contrary to the CGC's assertion, the judge did not address—let alone reject—the argument that the alleged comparators were distinguishable on the basis that they did not work in the materials department. Moreover, the judge did not address or reject the argument that the alleged comparators were distinguishable on the basis that they worked under different supervision.

At most, the judge stated in a footnote that the fact that Mason was a team lead is irrelevant to the issue of disparate treatment because Respondent has not articulated being a team lead as a basis for treating Mason more harshly than other employees (Decision, p. 9 fn. 18). As explained in Respondent's brief in support of exceptions (R. Br. 32-33), the judge completely misread or

ignored the record evidence in that regard. Jarrett, Fair, and Huqq all testified about how Mason's status as a team lead impacted their impressions of her misconduct (Tr. 327, 398, 450, 482). Even the Union's chief steward, Stanley Reese, acknowledged at the hearing that more is expected of team leads (Tr. 58, 83). It is improper for the judge to ignore clear testimony and substitute his opinion as to whether being a team lead made a difference in treatment.

3. No union animus based on other unfair labor practices or anti-union conduct

CGC argues that the judge's finding of animus is supported by evidence of "other unfair labor practices and evidence of other conduct consistent with anti-Union animus" (GC Br. 30). Specifically, CGC refers to unsubstantiated allegations of misconduct by management during the Union's organizing campaign, and gross mischaracterizations of Respondent's response to the campaign. Importantly, however, the judge did not rely on this alleged "other" conduct to support his finding of animus. Again, the judge's finding of animus rested exclusively on Mason's confrontation with Gulka and "Matt" before the second election and his misguided view of the alleged comparator evidence.

In any event, as explained in Respondent's exceptions brief (R. Br. 41-44), Electrolux has not been found to have committed any other unfair labor practices, including during its response to the organizing activity in 2015 and 2016. Contrary to CGC's exaggerated description of Electrolux's response to the Union's second campaign as being "vigorous[ly] anti-Union," the record reflects that Electrolux did nothing more than exercise its Section 8(c) right to communicate with employees in a very limited and restrained manner.

Moreover, and further contrary to CGC's baseless speculation, there is no evidence Respondent "stream[ed] anti-Union messages on the video monitors in Respondent's cafeteria/break room" (GC Br. 30). The only specific evidence concerning messages displayed on

the video monitors during the campaign prior to the second election was from Chief Steward Reese, who vaguely explained, "One of the messages said authorization cards are a legal and binding document and even if you sign them, the card can sell online and you can be legally bound—bound by those cards" (Tr. 67). Even by the Chief Steward's description, this message is not "anti-union."

It is one thing to exaggerate the extent of an employer's response to a union campaign. It is another thing to falsely represent that Electrolux engaged in unlawful interrogations, discipline, and discharges of employees during the campaign period. Yet, CGC does just that. Specifically, CGC contends that Reese was unlawfully ejected from Electrolux's premises around April 2016; Electrolux unlawfully recorded employees handbilling around July 2016; and Electrolux unlawfully removed union campaign literature from the employee break rooms and bathrooms around August 2016 (GC Br. 30-31). As explained in Respondent's exceptions brief (R. Br. 41-43), there is no evidence in the record to support any of those allegations.

Additionally, to the extent any allegations against Electrolux pertaining to its response to the organizing activity were resolved by an informal settlement agreement, in no way can the underlying conduct be considered to show animus in this case given that the settlement agreement included a non-admissions clause. See *Parker Seal Co.*, 233 NLRB 332, 335 (1977) ("[A]n informal settlement with a nonadmission clause do[es] not . . . constitute competent evidence of the prior alleged unlawful conduct of the settling party; nor [is it] admissible to show animus.").

Finally, in her answering brief, CGC makes much ado about Mason's complaints regarding the bathroom log incident and the subsequent alleged threat by Supervisor Fair that he would "lie on her" if his job was on the line. (GC Br. 28.) The judge properly disregarded this evidence as irrelevant to the issue of whether Mason's *union* activity was a motivating factor in her discharge.

At most, Mason's complaints were protected concerted activity, which the judge aptly found had nothing to do with her discharge.[2] (Decision, p. 11, lines 14-22.)

B. The Judge Improperly Substituted His Judgment for Management's Judgment.

Respondent argued in its exceptions brief that the judge substituted his own judgment for that of management as evidenced by his preoccupation with the fact that production did not stop as a result of Mason refusing to comply with her supervisor's instructions (R. Br. 45-46). In response, CGC argues, in conclusory fashion, that the judge "carefully weighed the evidence presented and concluded that Respondent's stark departure from its practice of issuing progressive discipline to employees accused of insubordination was evidence that Respondent was motivated to retaliate against Mason because of her Union activities" (GC Br. 32).

As explained above, to the extent the judge's decision rests on his assessment of Respondent's past practice of disciplining employees accused of insubordination, it is seriously flawed. Contrary to CGC's argument, Respondent has not applied progressive discipline to all other employees accused of insubordination. To be sure, the record plainly establishes that at least two other employees, Carey Taylor and Lakelia Davis, were discharged for a first offense of insubordination.[3] (GC Exhs. 13, 16.)

[2]CGC filed cross-exceptions to the judge's decision that Mason was not discharged because of any protected concerted activity. Respondent will be filing an answering brief discussing the facts related to Mason's alleged protected concerted activity and addressing CGC's cross-exceptions.

[3]Prior to the incident giving rise to his discharge, Taylor was issued a 5-day suspension for leaving a mandatory meeting without permission. However, Respondent rescinded that suspension pursuant to a settlement agreement (GC Exh. 3), which means it never occurred. Regardless, even if the suspension had not been rescinded, it does not establish that progressive discipline was followed for Taylor, as leaving a mandatory meeting without permission is not akin to blatantly refusing to comply with a supervisor's direct instructions. And, of course, Mason refused multiple times to comply with instructions.

Regarding the other alleged comparators who received less than discharge for insubordination, the record is clear that their misconduct was not comparable to Mason's misconduct, as explained in Respondent's exceptions brief (R. Br. 31-39). See *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 5 (2016) (recognizing that even if employees are disciplined for misconduct that is labeled the same, they are not comparators when one of the "infraction[s] [is] markedly different").

CGC continues by arguing that it is difficult for Respondent to reconcile the fact that Jarrett did not consider Mason's alleged insubordination sufficiently egregious or disruptive to warrant an immediate suspension pending investigation, but serious enough to be cause for termination (GC Br. 32). Like the judge, CGC's argument misses the mark and ignores undisputed record evidence.

Jarrett credibly explained that Respondent construed the interim disciplinary procedure as calling for suspension only when someone presented a "harmful threat" (Tr. 495), which is consistent with the actual language in the procedure that employees could be suspended for conduct that included "workplace violence, weapons, drugs, and other serious violations" (R. Exh. 6). Mason's misconduct occurred on a Friday. Multiple witnesses were interviewed in connection with her reported misconduct. She attempted to explain during the investigatory interview why she did nothing wrong. There was no reason for Jarrett to conclude that Mason posed a harmful threat to other employees or should other be suspended with the likes of employees who engage in workplace violence or bring weapons or drugs into the plant. Jarrett exercised her independent judgment to allow Mason to return to work while the investigation continued. Fortunately, Mason did not engage in any further misconduct during that time period, so Jarrett's decision to not suspend her had no negative consequences.

The fact that Mason was not immediately suspended says nothing about Respondent's motivation for terminating her. The investigation revealed that she blatantly refused to comply with her supervisor's instructions multiple times. The interim discipline procedure provides that Respondent must wait a minimum of three days before implementing a decision. (R. Exh. 6). And just when that three days expired, Mason provided her own statement in which she reiterated the multiple excuses for why she failed to comply with her supervisor's instructions. If anything, Electrolux was bending over backwards to give Mason a chance to tell her side of the story—hardily evidence of union animus.

Accordingly, the legitimate grounds for the timing of Mason's discharge in relation to when the misconduct occurred cannot be reasonably disputed. For the judge and CGC to suggest that it should have been handled differently is nothing more than a classic attempt to substitute their judgment for management's judgment, which is improper.

C. The Judge's Credibility Determination Concerning Jarrett Should Be Overturned.

Respondent argued in support of its exceptions that the judge's credibility resolutions concerning Jarrett were not based on her demeanor (R. Br. 48-49). In fact, unlike how he evaluated other witnesses who testified, the judge did not offer a single reason for why he was not crediting Jarrett. Cf. Decision, p. 4 fn. 6 ("I do not fully credit Mason's testimony because it is self-serving. I do not fully credit Fair's [testimony] because it is very confusing and at times inconsistent."). In her answering brief, CGC offers nothing to save the judge's flawed conclusion.

First, although the judge made no such finding, CGC argues that Jarrett's testimony about why the counseling form was not given to Mason and why she was not immediately suspended lacks credibility because Respondent did not corroborate it through Roberts (GC Br. 33). CGC ignores basic evidentiary principles. If CGC had evidence to rebut Jarrett's testimony, she should

have introduced it, or at least raised a suspicion about the veracity of her testimony through cross-examination. She did neither. Consequently, the onus was not on Respondent to bolster Jarrett's uncontradicted testimony.

Second, CGC argues, again despite the judge making no such finding, that Jarrett's testimony is not credible because it was factually inaccurate, conclusory, and/or skewed to support Respondent (GC Br. 34). According to CGC, the best example of this was Jarrett's recollection that Mason failed to fulfill the needs of Line 1, as opposed to Line 2. CGC mischaracterizes Jarrett's testimony.

When describing her conversation with Roberts about the facts she discovered during her investigation, Jarrett testified that she informed Roberts that she told Mason, "Why couldn't you just, you know, get someone on your team to fulfill the – you know, Line 1, like [Supervisor Huqq] said, Line 1 is key. If Line 1 and 2 don't run, that makes the money of the building." (Tr. 450). CGC suggest that Jarrett's testimony is not credible because Mason never had responsibilities for Line 1, and Supervisor Fair never claimed that Mason was instructed to do anything relating to Line 1. As it turns out, however, Supervisor Huqq did indeed report to Jarrett that he observed Fair ask Mason to assist with *Lines 1 and 2* (GC Exh. 11, p. 2).

Huqq's statement provided as follows:

> Around 7:45 Supervisor (Chris Fair) were (sic) attempting to locate a lift driver to support Lines 1 and 2. Supervisor (Chris) spotted [Mason] and asked her to assist us w/ lift for Lines 1 and 2 and [Mason] stated that wasn't part of her job duties. I attempted to intervene by telling [Mason] that without Lines 1 and 2 operating, the entire plant would not have jobs. [Mason] rode away on tug as if nothing we stated mattered at all.

(GC Exh. 11, p. 2).

Consequently, Jarrett's recollection about what she told Roberts following her investigation was accurate. It had indeed been reported to her that Mason was refusing to comply

with instructions to deliver parts to both Lines 1 and 2. To discount Jarrett's testimony based on a mistaken belief that it was inconsistent with other evidence is reversible error.

Next, CGC contends that the judge properly failed to credit Jarrett's testimony because she did not credibly explain why Mason's alleged insubordination warranted discharge while the insubordinate behavior of other employees did not (GC Br. 34). Specifically, CGC points out that Jarrett did not testify about any of the comparator evidence CGC offered into the record save for the termination of Lakelia Davis. Contrary to CGC's argument, Jarrett's failure to testify about each of the alleged comparator situations does not mean her testimony about other events is not credible. It is certainly reasonable to assume that Jarrett did not have first-hand knowledge of any other alleged comparators because she either was not employed by Electrolux at the time or she was not the HR Director. As the record reflects, Jarrett was an HR business partner from March 2016 until she was promoted to HR director in December 2017 (Tr. 431-432). Moreover, as explained in Respondent's exceptions brief, the disciplinary records themselves illustrate that no disparate treatment occurred (R. Br. 29-39).

In short, there is simply no rational basis to support the judge's conclusion that Jarrett was not credible or CGC's conclusory assertion that Jarrett was patently incredible and biased. And while the Board commonly refuses to disturb a judge's credibility findings, when they are not based "primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." *International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Co.)*, 221 NLRB 1073, 1074 fn. 5.

III. CONCLUSION

For the reasons set forth in Respondent's exceptions and brief in support of exceptions, the Board should overrule the judge's determination that Mason was discharged because of her union

activity. To allow this decision to stand would be to allow the CGC and the judge to substitute their judgment for the Company's when it comes to addressing a team leader who was undisputedly insubordinate and disruptive in the workplace.

Respectfully submitted,

s/ Reyburn W. Lominack, III
Reyburn W. Lominack, III, Esquire
Stephen C. Mitchell, Esquire
FISHER & PHILLIPS LLP
1320 Main Street, Suite 750
Columbia, South Carolina 29201
Tel. (803) 255-0000
smitchell@fisherphillips.com
rlominack@fisherphillips.com

Attorneys for Respondent

September 28, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELECTROLUX HOME PRODUCTS, INC.	)	
	)	
and	)	Case 15-CA-206187
	)	
J'VADA MASON, an Individual	)	
	)	

CERTIFICATE OF SERVICE

It is hereby certified that Respondent's Reply to Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision in the above-captioned case has been served on the following by e-mail on the date set forth below:

Linda M. Mohns
Field Attorney
NLRB Subregion 26
80 Monroe Avenue, Suite 350
Memphis, TN 38103
Linda.Mohns@nlrb.gov

J'Vada Mason
4484 Westbury Drive
Memphis, TN 38141
j.mason75@yahoo.com

s/ Reyburn W. Lominack, III
Reyburn W. Lominack, III

September 28, 2018